

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554**

In the Matter of:

Petition of Kohll's Pharmacy & Homecare Inc.'s
for Declaratory Ruling and Waiver

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) CG Docket No. 02-278
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**PETITION OF KOHLL'S PHARMACY & HOMECARE INC.'S FOR DECLARATORY
RULING AND WAIVER**

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March 24, 2016

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Pursuant to 47 C.F.R. § 1.2, Petitioner Kohll's Pharmacy & Homecare, Inc. ("Kohll's") respectfully petitions the Federal Communications Commission ("Commission") to issue a declaratory ruling stating that facsimiles sent on Kohll's behalf did not violate the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") where the facsimiles simply informed businesses of the health benefits of corporate flu vaccinations.

I. INTRODUCTION

Kohll's has been sued by Ballard Nursing Center, Inc. ("Ballard") in the Circuit Court of Cook Count Illinois for sending Ballard a single facsimile which informed Ballard the health benefits of flu vaccinations. Kohll's seeks a declaratory ruling that the facsimile was not an "unsolicited advertisement" under the TCPA. Alternatively, Kohll's seeks a declaratory ruling that the facsimile should be exempt from the TCPA under certain "health care" related exceptions enacted by the Commission which apply to text messages and phone calls.

The TCPA defines an "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227(a)(5). The Kohll's employee who created the facsimile testified that its purpose of

the facsimile transmission was to "promote wellness . . . so that people would get vaccinated and not get ill." Exhibit A, deposition testimony of Kohll's employee Laurie Dondelinger, p. 13. The facsimile sent to Ballard is reproduced below:

3/3/10 15:25

402-408-2414

HR Exec

D 1/1

Corporate Flu Shots

Only \$16-\$20 per vaccination

Did you know....

10 employees sick from the flu costs you \$877.10

Each flu infection results in 3-5 missed work days and up to 2 weeks of low work productivity

How much is the flu REALLY costing your company?

Protect your assets! Vaccinate your employees.

Call for a free quote today

(877) 408-1990

www.MyWorkWellness.com

Providing corporate vaccinations for over 15 years

A division of Kohll's Pharmacy & Homecare...trusted since 1948

Removal From List Request

If you have received this information in error or if you are requesting that transmissions cease in the future, please notify the sender to be removed as the recipient of future transmissions. Notify the sender by sending a return transmission to (402) 895-7655, by calling (866) 500-7800, extension 154, or by sending an email to akurland@kohlla.com.

A total of 4,142 facsimiles were successfully sent by WestFax, a third party provider, to businesses in St. Louis Missouri, Omaha Nebraska, Des Moines Iowa and Chicago Illinois. See Exhibit A, p. 84, lines 17-25, p. 85, lines 1; Exhibit B-1, Kohll's Answer to Int. no. 8; Exhibit B-

2 (invoice from Westfax). Kohll's obtained the facsimile numbers at issue from RedDoor Marketing, a third party provider. Exhibit B-2, Kohll's Answer to Interrogatory no. 4.

Ballard is a prolific TCPA class action plaintiff; having filed dozens of TCPA based class actions. Exhibit C-1, state court docket listing Ballard's cases and Exhibit C-2, federal court docket listing Ballard's cases. Ballard sued Kohll's in the Circuit Court of Cook County Illinois Kohll's on April 20, 2010. Ballard filed an Amended Motion for Class Certification on November 19, 2012. Exhibit D. The Amended Motion for Class Certification did not argue whether the facsimile was an "advertisement" under the terms of the TCPA. On April 15, 2013, the circuit court granted Plaintiff's Amended Motion for Class Certification. Exhibit E. On September 30, 2014, an Illinois Court of Appeals affirmed circuit court's certification order. Exhibit F. On October 22, 2015 Illinois Supreme Court affirmed class certification. Exhibit G. Significantly, no court opinion has held that the subject facsimile constitutes a prohibited "advertisement" under the TCPA. See Section III-B of this Petition. Accordingly, by way of this Petition, Kohll's seeks a declaratory ruling that the subject facsimile is not an "advertisement" under the TCPA.

Pursuant to 47 C.F.R. § 1.2(a), "[t]he Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." Here, there is a controversy and uncertainty as to whether the subject facsimile constitutes an "advertisement" under the TCPA. To avoid doubt and to assist the trial court in interpreting TCPA in a future merits-based ruling, Kohll's is asking the Commission to declare that the facsimile in question is not an "advertisement" under the TCPA. Alternatively, the Commission should declare that the facsimile is exempt from the

TCPA in accordance with recent exemptions created by the Commission in relation to health care related telephonic communications with consumers.

Lastly, even if the Commission determines that the facsimile in question was an advertisement, the Commission should issue a waiver for the subject facsimile to avoid potentially bankrupting Kohll's. The issuance of a waiver will not harm the public as the putative class members did not suffer any significant injury in (allegedly) receiving the subject facsimile. See Exhibit H. Similar waivers have been provided by the Commission where members of the public suffered no real harm where advertising facsimiles did not include statutory opt-out language.

II. BACKGROUND

A. The TCPA Was Enacted to Limit Advertisements, Not Informational Facsimiles

The TCPA prohibits the use of a telephone facsimile machine to send an "unsolicited advertisement" to another fax machine. 47 U.S.C. §§ 227(a)(5) & (b)(1)(C). The TCPA defines an "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." § 227(a)(5). "[M]essages that do not promote a commercial product or service . . . are not unsolicited advertisements under the TCPA." *In re Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991 & the Junk Fax Prevention Act of 2005*, 21 F.C.C.R. 3787, 3810 (F.C.C. Apr. 6, 2006).

In enacting the TCPA, Congress clearly set out that the statute was only to bar "any material advertising the commercial availability or quality of any property, goods, or services." 47 U.S.C. § 227(a)(5) (2010). The TCPA attempts to draw a line between informational messages and advertisements. *See* 47 U.S.C. § 151; 47 C.F.R. § 64.1200; *Rules and Regulations*

Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005 ("FCC Rules and Regulations"), 71 Fed.Reg. *25, 972–73 (May 3, 2006).

The TCPA defines "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." § 227(a)(5). Various courts have attempted to apply this definition to determine whether a facsimile is an "advertisement" under the terms of the TCPA. For example, in *Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.*, the Sixth Circuit Court of Appeals held that the TCPA "unambiguously defines advertisements as having commercial components" 788 F.3d at 223. The court in *Medco* provided a detailed analysis of what constitutes an advertisement. According to *Medco*, the TCPA's definition allowed it to "glean a few things from that definition." *Id.* at 221.

For one thing, we know the fax must *advertise* something. Advertising is "[t]he action of drawing the public's attention to something to promote its sale," Black's Law Dictionary 65 (10th ed.2014), or "the action of calling something (as a commodity for sale, a service offered or desired) to the attention of the public," Webster's Third New International Dictionary 31 (1986). So material that advertises something promotes it to the public as *for sale*. For another thing, we know that what's advertised -- here, the "availability or quality of any property, goods, or services" -- must be *commercial* in nature. Commercial means "of, in, or relating to commerce"; "from the point of view of profit: having profit as the primary aim." Webster's Third at 456. It's something that relates to "buying and selling." Black's Law Dictionary 270 (6th ed.1990). So to be an ad, the fax must promote goods or services to be bought or sold, and it should have profit as an aim.

This refinement puts meat on the Act's bones: An advertisement is any material that promotes the sale (typically to the public) of any property, goods, or services available to be bought or sold so some entity can profit. *See* 47 U.S.C. § 227(a)(5); *see also* Black's Law Dictionary (10th ed.) at 65 (defining advertisement as a "commercial solicitation; an item of published or transmitted matter made with the intention of attracting clients or customers").

Id. at 221-22 (emphasis in original).

The *Medco* court concluded that the definition of "advertisement" was not ambiguous, and therefore determined that it did not need to "wad[e] into another dispute: determining the effect (if any) of the Federal Communications Commission's interpretation on this case." *Id.* at 223. *Medco*, however, found that the "reliance on the Commission's interpretation would only bolster our conclusion." 788 F.3d at 223. Similarly, the court in *Physicians Healthsource, Inc. v. Janssen Pharmaceuticals*, 2013 WL 486207, *3 (D. N.J. Feb. 6, 2013) held that "the FCC's examples of what constitutes an advertisement do provide some guidance on how courts should apply the statutory definition of "advertisement." 2013 WL 486207, *3.

The court in *Janssen Pharmaceuticals* relied on a Commission publication and cases to discuss the differences between facsimiles advertisements and non-advertising facsimiles:

The Commission has provided examples as to what constitutes an unsolicited advertisement in its Regulations. *See FCC Rules and Regulations* at *25,972–73; *N.B. Indus. v. Wells Fargo & Co.*, 2010 U.S. Dist. LEXIS 126432, at *1, *14, 2000 WL 33800185 (N.D. Cal. Nov. 30, 2010). In doing so, the Commission has clarified that four types of messages do not fall under the purview of the TCPA: (1) informational messages; (2) transactional messages; (3) non-commercial messages from non-profit organizations; and (4) non-advertisement messages with an incidental amount of advertising. *See Id.*

Janssen Pharmaceuticals, 2013 WL 486207, *3. According to *Janssen*:

[S]tatements which do not promote the commercial availability or quality of a good or service are informational messages exempted from the TCPA. *See* 47 U.S.C. § 227(a) (5); *FCC Rules and Regulations* at *25,972–73.; *N.B. Indus.*, 4939970 at *17. Examples of informational messages include: industry news articles, legislative updates, and employee benefit information that do not promote the commercial availability or quality of a good or service. *FCC Rules and Regulations* at *25,972–73; *see, e.g., Holmes v. Back Doctors Ltd.*, 2009 WL 3425961, * 1 (S.D. Ill. Oct.21, 2009) (finding regularly distributed news letters to a target audience for educational purposes not an advertisement). Likewise, notifications concerning the existence of an opportunity are informational messages not prohibited by the TCPA. *See N.B. Industries*, 2010 U.S. Dist. LEXIS 126432 at *21–*22, 2009 WL 2515594 (fax notifying the recipient of an upcoming award ceremony and asking for applications is not an

advertisement); *see also Phillips Randolph Ent., LLC v. Adler–Weiner Research Chicago, Inc.*, 526 F.Supp.2d 851, 853 (N.D. Ill. 2007) (finding a fax notifying the recipient of a new research study on a health care program was not an advertisement); *Ameriguard, Inc. v. University of Kansas Medical Center*, 2006 WL 1766812 (W.D. Mo. June 23, 2006) (same); *Lutz Appellate Serv., Inc. v. Curry*, 859 F.Supp. 180, 181 (E.D. Pa. 1994) (fax announcing the existence of job openings was not an advertisement for a property, good, or service).

2013 WL 486207, *3.

Applying the above principles, the Court in *Medco* held that two pharmacy formulary related facsimiles at issue were not advertising facsimiles:

[F]axes "that contain only information, such as industry news articles, legislative updates, or employee benefit information; are not advertisements under the Act. 71 Fed. Reg. at 25973. The Commission considers several factors to determine whether a fax is informational or promotional, and where the fax's "primary purpose is informational, rather than to promote commercial products," it is not covered by the Act. *Id.* That aptly describes the faxes here. They contain only information—parts of the formulary—and do not seek to promote products or services to make a profit. The faxes are analogous to the employee-benefit information discussed in the regulation.

Id. at 223. Additionally, the court in *Medco* rejected the notion that a "hypothetical economic benefit" could otherwise turn the subject facsimile into an advertisement. *Id.* at 225 ("The fact that the sender might gain an ancillary, remote, and hypothetical economic benefit later on does not convert a noncommercial, informational communication into a commercial solicitation. Plus, no record evidence reliably shows that there would be such a financial benefit from these faxes")

Similarly, the court in *Janssen* held that facsimiles at issue were not advertisements:

In the case at hand, I find that the faxes are not advertisements. First and foremost, the faxes do not advertise either the commercial availability or the quality of Levaquin; rather, they simply notify the recipient of Levaquin's reclassification and provide the recipient with up-to-date information. Moreover, while the faxes contain the phrase "Available on," such a phrase does not suggest that the fax is advertising the commercial availability of Levaquin. Rather, they only refer to the fact that Levaquin

has now been reclassified, not where or how it is available for purchase. In short, there are no statements included in the content of the fax that promote either the availability or the quality of Levaquin.

Furthermore, I reject Plaintiff's position that the Court should inquire as to whether Defendants would obtain an ancillary commercial benefit as a result of sending the fax. As iterated above, the inquiry under the TCPA is whether the content of the message is commercial, not what predictions can be made about future economic benefits. Moreover, the link between Defendants receiving any commercial benefit from sending this type of information to prescribing doctors is too tenuous for the Court to speculate.

2013 WL 486207, *3. Further, the court in *Janssen* held that the "the inclusion of marketing logos also does not transform the faxes into advertisements. Indeed, as a general matter, an incidental advertisement of the sender's goods or services does not convert the entire communication into an advertisement. *Id.* at *5 (citing *N.B. Indus. v. Well Fargo & CO.*, 2010 U.S. Dist. LEXIS 126432 at *28–30, 2009 WL 2515594 (N.D. Cal. Nov. 30, 2010) (finding use of modestly sized logos on a fax did not transform the fax into an advertisement). Finally, the court held that "the contact information placed on the fax in this case is only incidental to the informational message of the fax and does not convert it into an advertisement." *Id.* at *6.

As discussed below in Section III-B, the facsimile transmission sent by Kohll's was not an advertisement under the terms of the TCPA.

III. ARGUMENT

A. The Commission Has the Power to Issue a Declaratory Ruling

Congress has granted to the Commission the "sound discretion" to issue a declaratory ruling in order to "terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e). 47 C.F.R. § 1.2(a) provides that "[t]he Commission may. . . on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty." *See, e.g., In re Southwestern Bell Mobile Sys., Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 19,898,

19,900 ¶ 5 (1999) (agreeing to issue declaratory ruling where there was “substantial uncertainty whether and to what extent” pending class action lawsuits were precluded by the Communications Act, as evidenced – in part – by "extensive comments . . . filed by interested parties" in response to petition).

B. The Commission Should Declare that the Facsimile Was Not an Advertisement Under the Terms of the TCPA

No court in the underlying case against Kohll's has determined that the subject facsimile is an "advertisement" under the terms of the TCPA. The appellate court simply suggested that the facsimile could be an advertisement, but did not decide so. Exhibit F, p. 8 ("Common questions include whether the fax was an 'advertisement' under the TCPA . . ."). Most notably, the Illinois Supreme Court did not analyze whether facsimile constituted an "advertisement" under the terms of the TCPA. Rather, the court noted the following in its "background" discussion: "The fax advertises defendant's 'Corporate Flu Shots' and provides estimates of the costs associated with employees missing work because of illness. It also provides a toll-free contact number for a “free quote” and an associated website." Exhibit G at p. 2, ¶ 7. Significantly, the court did not cite to a single case or any Commission ruling or publication. The court's analysis is woefully inadequate on this threshold issue. Simply stated, Kohll's cannot be liable under the TCPA in the absence of a finding that it transmitted an advertising facsimile.

As noted above, in *Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218 (2015), the Sixth Circuit Court of Appeals held that facsimiles sent by pharmacy benefit manager to a healthcare provider were not prohibited "advertisements" where the facsimiles listed medications available in health plans of provider's patients. According to the Sixth Circuit, the facsimiles did not solicit business for a commercially available product or service, but rather listed medications in a purely informational, non-pecuniary sense to inform

provider what drugs its patients might prefer, based on a paid service already rendered to manager's clients. In so holding, the court found that the possibility that future economic benefits could flow from the facsimile was irrelevant to determining whether fax was an "advertisement." Further, the court of appeals held that the broad remedial goals of the TCPA were insufficient justification for interpreting a specific provision more broadly than its language and the statutory scheme reasonably permit.

Here, the facsimile at issue is not an advertisement in the traditional sense. Rather, it was sent to businesses and identifies the fact that employees suffering from the flu can result in missed work and reduced productivity. The facsimile suggests that the recipient should obtain vaccinations for its employees. While the facsimile identifies a cost and suggests that recipients call for a quote, this fact is incidental to the *health care message* being sent by the facsimile.

Consistent with *Medco* and *Janssen Pharmaceuticals*, the facsimile is not an advertising facsimile because it primarily provides information related to the health benefits of flu vaccinations. Accordingly, like in *Medco*, the facsimile is "analogous to the employee-benefit information." Alternatively, even if the Commission disagrees, the facsimile should be exempted from the TCPA based upon recent "health care" related exceptions to other TCPA provisions governing residential and cellular phone communications.

C. The Facsimile Should be Exempted From the TCPA Based Upon Recent Health Care Related Exemptions that the Commission Has Applied to Residential and Cellular Phone Communications

Recent Commission regulations have exempted certain health care related calls from certain TCPA regulations which apply to telemarketing calls and texts to residential and cellular phones. *See, e.g.,* 47 C.F.R. § 64.1200(a)(2). These regulations should help guide the Commission's determination that information facsimiles discussing the health benefits of flu

vaccinations should be exempted from the scope of the TCPA's regulations governing facsimiles. As discussed below, the facsimile at issue is a quintessential example of a "health care" message made by, or on behalf of, a "covered entity," within the meaning of the TCPA. See 47 C.F.R. § 64.1200(a)(2).

In particular, calls offering flu shots and prescription refill reminders are explicitly referenced in the Commission's regulatory materials as the kinds of health care messages covered under the Health Insurance Portability and Accountability Act ("HIPAA") that do not require written consent. The Commission considers this type of text to be merely an informational message that does not constitute an "advertisement[]" and therefore does not require express written consent. See 47 C.F.R. § 64.1200(a)(2); see also 2012 FCC Report & Order, at p. 48; 2012 FCC Final Rule, ¶ 46 (June 11, 2012).

Acting pursuant to its rulemaking authority, the Commission passed regulations interpreting the TCPA, which became effective on October 16, 2013. The Commission's regulation interpreting Section 227(b) of the TCPA exempts from the requirement of written consent calls that deliver health care messages from HIPAA-regulated entities:

No person or entity may ... [i]nitiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section [including calls to "any telephone number assigned to a ... cellular telephone service"], other than a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

47 C.F.R. § 64.1200(a)(2) (emphasis added).

A "covered entity" under HIPAA is defined as a (1) health plan, (2) a health care clearinghouse, or (3) a health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter. 45 C.F.R. § 160.103. And to be clear, a pharmacy is a health care provider and a "covered entity" under HIPAA. *Parker v. Quinn*, No. 1:04 CV 313 D, 2006 WL 980810, at *4 (N.D. Miss. Apr. 12, 2006) ("A pharmacy is a health care provider under HIPAA.") (citing 45 C.F.R. § 162.920(b) (2005)); *Liska v. United States*, No. CV09-8190-PCT-NVW, 2010 WL 1038652, at *10 (D. Ariz. Mar. 19, 2010) (presuming that the Walgreen pharmacy was a "covered entity" under HIPAA). *See also* Steven D. Morgan, Esq., Implementing the HIPAA Transaction Standards in Managed Care Pharmacy Settings, 16 No. 1 Health Law 14 (November 2003) (listing pharmacies as "covered entities under HIPAA").

Although the Commission does not directly define the term "'health care' message," it does so by reference to the HIPAA Rule, 45 C.F.R. 160.103. The HIPAA Rule, in turn, defines "health care" as "care, services, or supplies related to the health of an individual" including, but not limited to, "[s]ale or dispensing of a drug, device, equipment, or other item in accordance with a prescription." 45 C.F.R. § 160.103. *Flu vaccinations clearly fall within this definition.* Further, "health-care-related calls governed by the [HIPAA], such as prescription pickup calls from pharmacies and appointment follow-ups from physicians' offices, are exempt from the TCPA." 140 Am. Jur. Proof of Facts 3d 509, § I.9 (2014) (citing 2012 FCC Report & Order, ¶57). As discussed below, the Commission should similarly conclude that health care related facsimiles such as the availability of flu vaccinations should be exempted from the TCPA.

In introducing the HIPAA exemption to pre-recorded calls, the FCC followed the FTC's approach of exempting HIPAA health care messages from the Telemarketing Sales Rule.

Telephone Consumer Protection Act of 1991, 77 FR 34233-01, ¶ 40 (June 11, 2012). In addressing the exemption for health care related calls subject to HIPAA, the FCC specifically mentioned immunization reminders and calls offering vaccinations as examples of calls that would fall within the HIPAA exemption:

46. In the FTC's TSR proceeding, concern was raised, in relevant part, whether immunization reminders, health screening reminders, medical supply renewal requests, and generic drug migration recommendations would constitute inducements to purchase goods or services. In the FCC's proceeding, one commenter argues that a call "pushing" flu vaccines would be illegal under the TCPA. Without reaching the merits of this argument, the Commission does believe that an exemption for prerecorded health care-related calls to residential lines is warranted when such calls are subject to HIPAA. With respect to the privacy concerns that the TCPA was intended to protect, the Commission believes that prerecorded health care-related calls to residential lines, when subject to HIPAA, do not tread heavily upon the consumer privacy interests because these calls are placed by the consumer's health care provider to the consumer and concern the consumers' health. Moreover, the exemption the Commission adopts in document FCC 12-21 does not leave the consumer without protection. The protections provided by HIPAA safeguard privacy concerns. Under the second prong of the TCPA exemption provision, which requires that such calls not include an unsolicited advertisement, the Commission finds the calls at issue here are intended to communicate health care-related information rather than to offer property, goods, or services and conclude that such calls are not unsolicited advertisements. Therefore, such calls would satisfy the TCPA standard for an exemption as provided in the Act and the FCC's implementing rules.

2012 FCC Final Rule, 77 Fed. Reg. 34, 233, ¶46 (emphases added).

The February 15, 2012 Report and Order by the Commission likewise acknowledged comments from a number of medical providers in support of the HIPAA exemption because the exemption "would allow the continuation of important communications by health care providers and health insurance plans such as prescription refills, *immunization reminders*, and post-hospital discharge follow-up." 2012 FCC Report & Order, ¶60 & n.176 (emphasis added).

The Commission ultimately agreed that "prerecorded health care-related calls when subject to HIPAA, do not tread heavily upon the consumer privacy interests because these calls are placed by the consumer's health care provider to the consumer and concern the consumer's health." Id. ¶ 63. In doing so, the Commission relied, in part, on the comments of America's Health Insurance Plans noting that the HIPAA exemption "would promote important communications by health care providers and health insurance plans with patients such as prescription refills and immunization reminders" and observing that "these communications promote health and streamline health care administration." Id. ¶ 63 & n.192 (emphasis added).¹

The regulations and guidance discussed above demonstrate that the facsimile received by Ballard was a "'health care' message" within the meaning of HIPAA and the TCPA. The facsimile concerned the availability of flu shots which clearly relates to "care, services, or supplies related to the health of an individual" including, but not limited to, "[s]ale or dispensing of a drug, device, equipment, or other item in accordance with a prescription." 45 C.F.R. § 160.103. Further, Kohll's is a "covered entity" under HIPAA. 45 C.F.R. § 162.920(b). Therefore, the Commission should conclude that the facsimile at issue is precisely the type of "important communication [] by health care providers and health insurance plans with patients" that the Commission intended to exclude from the written consent requirement under the telephone based prohibitions contained within the TCPA. In fact, the 2012 FCC Final Rule, specifically lists "immunization reminders, health screening reminders" and "call[s] pushing flu vaccines" as examples of communications that warranted the HIPAA exemption for prerecorded

¹ Although the explanation of the exemption for HIPAA-covered calls appeared in the context of a discussion of the residential lines part of the Rule, not cell phones, the part of the Rule regarding residential lines and the part of the Rule regarding cell phones and text messages both contain an identical HIPAA exemption. As the final rule in 47 C.F.R. § 64.1200 uses the identical language to exempt HIPAA covered messages from both cell phone calls and residential calls, *compare* 47 C.F.R. § 64.1200(a)(2), *with* 47 C.F.R. § 64.1200(a)(3)(v), the preamble language should be applied to both types of calls as well.

calls). 2012 FCC Final Rule ¶ 46. See also 2012 FCC Report & Order, ¶ 63 & n. 192 (listing "prescription refills and immunization reminders" as the types of "important communications by health care providers and health insurance plans with patients" that warrant the HIPAA exemption). Although Kohll's acknowledges that the Commission's recent regulations were issued in relation to new requirements regarding written consent for *telemarketing calls and texts to phones* (47 C.F.R. § 64.1200(a)(2)), as discussed above, these regulations should help guide the Commission's determination that information facsimiles discussing the health benefits of flu vaccinations should be exempted from the scope of the TCPA's regulations governing facsimiles.

In conclusion, it would also be contrary to the public interest, as exposing Kohll's to massive class action liability for transmitting the health benefits of flu vaccinations to businesses. A ruling by the Commission on this issue will also assist other parties who are facing TCPA litigation regarding medical and pharmaceutical related facsimiles.

D. Without Granting the Relief Requested, the TCPA Would Violate the First Amendment

Under well-established Supreme Court precedent, commercial speech may be burdened only where the government can show that the proposed restriction directly advances a substantial government interest and that the regulation "is not more extensive than is necessary to serve that interest." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). It would be unconstitutional for the TCPA to impose a blanket prohibition on all fax communications between businesses. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 (1980). According, non-commercial or non-advertising facsimiles fall outside the TCPA's prohibition. See, e.g., *Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218 (2015), *Holmes v. Back Doctors, Ltd.*, 2009 WL 3425961, *1, *4 (S.D. Ill. Oct.21, 2009); *Hinman v. M & M Rental Ctr., Inc.*, 596 F.Supp.2d

1152, 1163 (N.D. Ill. 2009). *See also Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56 (9th Cir.1995).

Applying the TCPA to the facsimile at issue while simultaneously exempting "health care" related calls to phones and text messages violates the First Amendment because there is no rational basis to restrict "health care" related facsimiles. Further, unlike annoying telemarketing calls, a single facsimile alerting businesses about how to manage employee health care, represent speech that serves the public interest. The Supreme Court has repeatedly rejected held that differential treatment may violate the First Amendment

For Example, the Supreme Court struck down a law prohibiting the disclosure of alcohol content on beer labels, but not in beer advertising. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488–91 (1995). *See also, Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 189–92 (1999) (exemptions and inconsistencies in a ban on gambling advertisements, combined with Congressional encouragement of tribal gambling, undermined the asserted justification that Congress designed the ban to reduce the social costs of gambling); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417–18, 424–25 (1993) (city's interest in aesthetics was not directly advanced by a prohibition aimed only at some sixty-two commercial newsracks, when hundreds of non-commercial newsracks were equally unattractive but permitted by the ordinance). Here, the prohibition against "health care" related facsimiles (but not to "health care" related calls and/or text messages violates the First Amendment.

Further, restriction on commercial speech must be no broader than is necessary to advance a substantial government interest. *Central Hudson*, 447 U.S. at 566. Again, because "health care" related texts and calls are exempted by the Commission, the TCPA's prohibitions

against facsimile based "health care" related communication are overly broad and do not advance a substantial government interest in violation of the First Amendment.

E. Alternatively, the Commission Should Grant a Waiver For Transmitted Facsimiles

If the Commission declines to issue a declaratory ruling as discussed above, Kohll's asks the Commission to provide a retroactive waiver for 4,142 facsimiles that were sent to Ballard and other businesses. A retroactive waiver can be issued as long as prior effective date of the waiver is specified. *In re United Telephone Co. of Kansas et al.*, Order, 25 FCC Rcd 1648, 1650, ¶ 5 (2010). *See also In re Provision of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order on Reconsideration, 20 FCC Rcd 5433 (2005).

Section 1.3 of the Commission's rules permits the Commission to grant a waiver for good cause shown, and the Commission should grant a waiver if, after considering all relevant factors, a waiver is in the public interest. 47 C.F.R. § 1.3. *See also, In re Rath Microtech Complaint Regarding Electronic Micro Sys., Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 16,710, 16,714, ¶ 15 (2001). A waiver is appropriate where "[t]he underlying purpose of the rule(s) would not be served" or "unique or unusual factual circumstances" mandate a waiver to avoid an application of the rule that would be "inequitable, unduly burdensome or contrary to the public interest." 47 C.F.R. § 1.925(b)(3)(i)-(ii). Here, a waiver is appropriate for both reasons.

First, as discussed above, it would be inequitable to deny Kohll's a "health care" exemption where the subject facsimile informed Ballard of the health benefits of flu vaccinations for its employees and provided estimates of lost business associated with non-vaccination of employees. Further, the possible cost of the vaccinees was a nominal component of the facsimile at best. Second, unless the Commission declares that the subject facsimile is not an

"advertisement" under the TCPA, the application of the TCPA to Kohll's will violate the First Amendment. Third, Kohll's is embroiled in a million-dollar-plus class action lawsuit. A finding that the facsimile at issue is an "advertisement" would be inequitable, unduly burdensome, and contrary to the public interest. Finally, a waiver is reasonable because no harm (above the nominal "cost" of printing facsimile) was inflicted on Ballard. See Exhibit H (deposition testimony of

IV. CONCLUSION

For the reasons stated above, the Commission should issue a declaratory ruling finding that the subject facsimile was not an "advertisement" under the TCPA. Alternatively, the Commission should apply its "health care" exception (which applies to text messages and phone calls) to health care related facsimiles. If the Commission is unwilling to provide any of this relief, at the very least it should grant a retroactive waiver for the subject facsimile.

Respectfully submitted,

/s/ James C. Vlahakis

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 24, 2016, a copy of Petitioner Kohl's Pharmacy & Homecare, Inc.'s Petition for Declaratory Rulings and/or for Waiver was served upon counsel of record at the following address via First Class Mail and email service.

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The undersigned also certifies that on March 24, 2016, he filed, by mail and internet Petitioner Kohl's Pharmacy & Homecare, Inc.'s Petition for Declaratory Rulings and/or Waiver with the Federal Communications Commission, Office of the Secretary, 445 12th Street, SW, Washington, D.C. 20554

/s/ James C. Vlahakis

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